UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KEVIN L. HENDRICKSON,

Plaintiff,

v.

FRANK E. CUTHBERTSON, *et al.*,

Defendants.

Case No. C07-5692 BHS/KLS

REPORT AND RECOMMENDATION

NOTED FOR:
March 21, 2008

This civil rights action has been referred to the undersigned United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. Plaintiff was given leave to proceed *in forma pauperis.* (Dkt. # 3). On January 2, 2008, Plaintiff filed his Complaint against a Pierce County Superior Court Judge, a prosecutor, his attorney and the Attorney General of Washington, seeking monetary damages of $1.5 million based on his illegal incarceration, loss of liberty, personal property and mental anguish. (Dkt. # 1).

On January 2, 2008, Plaintiff was ordered to show cause why his complaint should not be dismissed for failure to state a claim under 42 U.S.C. § 1983. Plaintiff filed his response and exhibit in support. (Dkt. # 7 and 8). Having carefully reviewed Plaintiff's response and the balance

of the record, the Court recommends that Plaintiff's Complaint should be dismissed without prejudice.

I. DISCUSSION

In his Complaint, Plaintiff seeks damages in the amount of $1.5 million based on his alleged illegal incarceration resulting from entry of an amended indictment for possession of stolen property in the first degree. (Dkt. # 4, Exh. C). Plaintiff alleges that on August 24, 2004, an information was filed against him in the Superior Court of Pierce County, Washington in Case No. 04-1-04088-6. *Id*. On January 20, 2006, Defendant Platt filed a Third Amended Information against Plaintiff, which added Count XIII, charging Possessing Stolen Property in the First Degree in Case No. 04-1-04088-6[1]. *Id*., Exh. C. On March 13, 2006, after the jury was unable to reach a unanimous verdict, Defendant Platt brought a motion to dismiss the case in its entirety without prejudice (on the grounds and for the reason that the State is currently evaluating the feasibility of retrying this case at this time). *Id.* The Order dismissing the case was signed by Defendant Superior Court Judge Frank Cuthbertson. *Id*., Exh. A. On April 14, 2006, Defendant Platt brought a second motion and order for dismissal without prejudice, which dismissed only Count I without prejudice ("for the reason that the state anticipates that some counts will be retired after appeal and this count can be refiled at the same time"). *Id*., Exh. B. Judge Cuthbertson signed this Order on April 14, 2006 *nunc pro tunc* to March 8, 2006. *Id*.

Plaintiff argues that the Superior Court lacked jurisdiction to sign the Order *nunc pro tunc* on April 14, 2006 and that the only way to regain jurisdiction at that time was for the State to have refiled the information or indictment against him. (Dkt. # 4, p. 3).

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[1]Additional background facts may be found at *State v. Hendrickson*, 158 P.3d 1257 (Wash. App. 2007), involving Mr. Hendrickson's appeal of his conviction for three counts of second degree identity theft. Mr. Hendrickson is a tow truck driver who stored financial information, some belonging to clients, in a stolen trailer. (*Id*., p. 1258). The Court of Appeals mentions the charge of possession of stolen property, Count I (the subject of the *nunc pro tunc* order at issue here), noting that the jury did not reach a unanimous verdict and the State dismissed Count I without prejudice. However, the validity of the *nunc pro tunc* order is not part of Mr. Hendrickson's appeal in this appellate decision. *Id*.

On January 2, 2008, after its initial review of Plaintiff's Complaint, the Court ordered the Plaintiff to show cause why his Complaint should not be dismissed for failure to state a claim under 42 U.S.C. § 1983. (Dkt. # 5). Plaintiff was advised that in order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (l) the conduct complained of was committed by a person acting under color of state law and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

When a person confined by government is challenging the very fact or duration of his physical imprisonment, and the relief he seeks will determine that he is or was entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to recover damages for an alleged unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. *Id.*

Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.* If the court concludes that the challenge would necessarily imply the invalidity of the judgment or continuing confinement, then the challenge must be brought as a petition for a writ of habeas corpus, not under § 1983." *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir.1997) (*quoting Edwards v. Balisok*, 520 U.S. 641

(1997)).

The Court also noted that Plaintiff has twice filed habeas petitions based on these same facts in this Court. *See* Case No. C06-5331RBL and C06-5571FDB. The cases were dismissed without prejudice for failure to exhaust as Plaintiff's appeals were pending in the Washington appellate courts. (*See e.g.*, Case No. C06-5331RBL, Dkt. # 7-1, p. 11; Case No. C06-5571FDB; Dkt. # 15, p. 2).

Plaintiff argues that the Court misinterprets the nature of his claims because he is not challenging the validity of his conviction, "but rather the actions of persons representing the state of Washington that were done without jurisdiction." (Dkt. # 6). Plaintiff also states that the "validity issues is now before the Washington State Supreme Court.[2]" *Id*.

The Court understands that Plaintiff has brought a claim for money damages and is not seeking relief in habeas. However, because Plaintiff is claiming that Defendants' conduct resulted in his illegal incarceration, he must first challenge his allegedly illegal conviction or imprisonment and must exhaust his claims by presenting them to the state's highest court, before he may recover damages for any such illegal conviction and imprisonment in a Section 1983 case. Plaintiff has advised the Court that a challenge to the validity of his conviction is currently pending before the Washington Supreme Court. (Dkt. # 6).

Accordingly, Plaintiff's claim for damages in this case relating to his claim that the *nunc pro tunc* order was entered without jurisdiction and resulted in his illegal incarceration that has not yet been invalidated, is not cognizable under§ 1983 and must be dismissed. *See, Balisok*, 510 U.S. at 649; *Heck*, 620 U.S. at 487; *Trimble v. City of Santa Rosa*, 49 F.3d 583, 586 (9th Cir. 1995)(per curiam).

[2]*See State v. Hendrickson*, 158 P.3d 1257 (May 1007), Washington Court of Appeals affirmed in part, reversed in part and remanded Plaintiff's convictions

II. CONCLUSION

Plaintiff's case fails to state a claim and must be **DISMISSED WITHOUT PREJUDICE.** Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report and Recommendation to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **March 21, 2008**, as noted in the caption.

DATED this 4th day of March, 2008.

Karen L. Strombom
United States Magistrate Judge